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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN L. RANDLE, Plaintiff and Respondent, v. STEVE M. DEFILIPPIS, Defendant and Appellant.	A131538 (Humboldt County Super. Ct. No. DR080874)

Plaintiff John Randle filed a complaint against defendants Livin' the Cove, LLC and Steven Defilippis, asserting two causes of action: judicial foreclosure and fraud in the inducement. The trial court bifurcated the claims to try the foreclosure action first, and following a bench trial issued a 15-page statement of decision concluding that "judicial foreclosure shall enter in favor of plaintiff and against defendants jointly and severally for the debt due in the amount of $220,978 plus interest, along with attorney fees and co1sts."

Defendant Defilippis moved for a new trial, which was denied, and now appeals, claiming that the trial court committed reversible error in three particulars: (1) denying his claimed right to a jury trial; (2) finding him liable on the promissory note; and (3) awarding attorney fees "where the contractual prerequisite had not been proven." We conclude that none of defendant's contentions has merit, and we affirm.

BACKGROUND

The Parties

Livin' the Cove, LLC (the LLC) was formed in June 2005 as a limited liability company, to buy and develop property at Shelter Cove, Humboldt County. Its original members were Gary Cantrell, Bush Can, Inc. (Ronnie Bush, President), and Jean Morrison. Defilippis became a member of the LLC shortly thereafter, at least by September 2005.

The LLC had acquired three lots in Shelter Cove, and sought to merge them into two and develop speculation housing on both lots. It needed money to finance the plan, and each "member" of the LLC signed a "Resolution (8/31/05) Special Agreement of Action," each member "giving [their] approval for a loan and encumbrance." The resolutions provided in pertinent part as follows:

"The LLC is going to obtain financing through Sun Pacific Mortgage and Real Estate in the form of a loan to enable the LLC to pay certain obligations and to proceed with operations consistent with the LLC's goal of constructing two homes, for the purpose of resale for profit. . . . The LLC is going to pledge all of its equity in the aforementioned three lots (44-45-46) as collateral for this loan, for which Steve M. Defilippis is going to sign and guarantee. This loan, expected to be funded the first week of September, 2005, will result in net proceeds to the LLC in the amount of approximately $235,000 (two hundred, thirty-five thousand dollars)."

Defilippis signed one of the resolutions and sent it to Susan Galiani at Humboldt Land Title with this note: "Here are the two Resolutions for *Livin' the Cove, LLC* that you require from me, which have previously been signed and submitted to you by the three other Members of the LLC: Jean Morrison, Gary Cantrell and Ronnie Bush."

Sun Pacific Mortgage and Real Estate (Sun Pacific), the entity through which the loan would be sought, was a mortgage brokerage owned by the husband and wife team of Forest and Lynn Tardibuono. Sun Pacific acted essentially as an intermediary, finding lenders willing to loan money to applicants seeking it, and on receipt of a loan application, would contact those it thought might be interested. One of the people with

whom Sun Pacific had dealt in the past was John Randle, who had made some four previous loans through Sun Pacific, all of which had either been paid or were being paid as promised. As will be seen, Randle became the lender here.

The Loan and the Deed of Trust

The LLC could not obtain such a loan on its own credit, and Bush asked Defilippis to participate with his creditworthiness and capacity. Defilippis agreed. An operating agreement was prepared for the LLC, section 10 of which, entitled "ONE-TIME PROVISION FOR INITIAL CAPITALIZATION," provided in part that "the loan will be obtained and guaranteed by Steve M. Defilippis, 6699 Buggy Whip Ct., San Jose, CA 95120." The operating agreement was later sent to Galliani via a cover memorandum from Bush which said in part: "You'll see at the bottom of Page 9 we gave authorization for Defilippis to obtain a loan using the LLC's property as collateral."

On August 10, 2005, Defilippis signed a uniform residential loan application for a $250,000 loan, and under "borrower" the application listed Defilippis, giving his social security number, date of birth, and address. The application represented that Defilippis had a monthly income of $16,000, real estate holdings valued at $2,100,000, and a FICO credit score of 750.

Randle discussed the loan application, including the credit information, with Lynn Tardibuono, and decided to make the loan, doing so, he said, based solely on the stated income and credit capacity of Defilippis. It was "absolutely" the basis for agreeing to the loan. Indeed, no credit capacity for the LLC was ever presented to Randle.

On September 8, 2005 Sun Pacific prepared a note secured by a deed of trust, and sent it, along with other documents, to Defilippis for execution. Defilippis signed the note in two places, on two lines side by side, each signature as "Borrower." One line was signed on behalf of the LLC as borrower. The other "borrower" was "Defilippis." Defilippis was, as Forest Tardibuono described him, a co-borrower.

In addition to signing as "borrower" on the note, Defilippis signed seven other documents identifying him as the "borrower." These included an amendment to the escrow instructions, "important loan information,"additional required California

disclosures, the itemization of amount financed, a statement as to the annual percentage rate, the "Mortgage Loan Disclosure Statement (Borrower)", and the "Lender-Borrower Escrow Instructions."

The note called for 23 monthly payments of $2,916.67, and a balloon payment on October 1, 2007 of $252,916.67. The LLC made some monthly repayments on the note. However, in late 2007, with the maturity approaching, Bush sought to "amend" the note, to give more time for its payoff, and on September 25, 2007, Bush submitted a request for amendment. Following some negotiation, Randle agreed to an amendment.

On December 1, 2007 an amendment to the note was signed by Cantrell, "Managing Member, LLC." The amendment was brief, with the agreement section having two paragraphs:

"AGREEMENT

"1. In consideration of the payment by Maker to Payee of $42,000 (which the parties acknowledge shall be applied first to the interest and fees specified in the recitals above, and the remainder to the principal balance of $250,000, so that the new principal balance as of the date of this Amendment is $217,000, the terms of the promissory note are hereby modified as follows: the due date shall be, and hereby is, extended to and including November 30, 2008. Interest shall accrue on the amended principal amount of the note ($217,000) at the rate of eleven percent (11%) per annum from the date hereof until paid in full ($1,989.17 per month).

"2. In all other respects, the terms of the promissory note attached hereto as Exhibit A shall remain unmodified and in full force and effect."

Following the amendment, the note was paid as promised for some seven months, or until July or August 2008. Then, the payments stopped and, as Randle would describe it, "By reason of these defaults, [he] . . . exercised his option and elected to declare the whole sum of principal and interest immediately due and payable" and he filed suit.

The Proceedings Below

On September 18, 2008, Randle filed a one-count complaint for foreclosure of a deed of trust, naming as defendants the LLC and Defilippis. In August 2009 Randle filed

the complaint operative here, the first amended complaint, adding a second count against Defilippis for fraud in the inducement.[1]

On September 11, Defilippis filed his answer. The LLC never appeared in the action, and its default was taken.

According to the register of actions, the case was vigorously litigated, with numerous law and motion matters. Meanwhile, the trial date was continued several times, finally to September 21, 2010.

Both sides filed several motions in limine, including motions by both sides to bifurcate the case. As Randle's motion put it, the motion to bifurcate was to "have the court hear the equitable claim of judicial foreclosure and later schedule a jury trial to hear the legal claim of fraud."

The trial court agreed to bifurcate, and thus the trial proceeded, for three half-day sessions. The court heard testimony from Randle, Forrest Tardibuono, Defilippis, Bush, and Galliani of Humboldt Land Title Company.

As Defilippis described the case below, the "lynch pin" issue was whether he was only a guarantor of the note, as he contended, or a borrower, as Randle contended. And much of the evidence was addressed to that issue. Following the presentation of evidence and the admission of exhibits, the trial court ended the trial with this observation: "I certainly am not going to make a finding at this point as far as whether Mr. Defilippis was a maker or borrower or a guarantor on this promissory note. [¶] Taking the loan documentation altogether, I do find, however, that there is some degree of uncertainty or ambiguity as to the role or capacity of Mr. Defilippis in this entire transaction. I'm not going to make a final determination until I've seen the closing briefs."

Those closing briefs were filed, to which both sides filed replies.

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[1] The fraud in the inducement claim was apparently based on Defilippis's position in the litigation that "This answering defendant did not sign any documents in an individual capacity, and did not intend to be personally bound, separate and apart from Livin' the Cove, LLC."

On November 17, 2010, the trial court filed its tentative decision which, following the introductory recitations about appearances, provided in its entirety as follows:

"Upon consideration of the oral testimony and documentary evidence presented at trial, and the closing and reply briefs submitted posttrial, the court finds in favor of plaintiff John L. Randle, Trustee, and against defendant Steve M. Defilippis, for the following reasons:

"(1) Plaintiff agreed to make the subject loan on credit capacity and written loan application of defendant Defilippis as Living' [*sic*] The Cove, LLC, was unable to qualify for a loan by itself.

"(2) Although defendant Defilippis contends that he entered into this loan transaction solely as a guarantor or surety, he signed nine (9) documents at loan closing that identified him as a borrower.

"(3) The promissory note is not ambiguous, and defendant Defilippis signed directly above the word 'Borrower'. Paragraph 7 of the note defendant Defilippis signed as a borrower provides:

> " '7. **RESPONSIBILITIES OF PERSONS UNDER THIS NOTE**
>
> If more than one person signs this note, each of us is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of the guarantor, surety, or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.'

"(4) Although defendant Defilippis did not personally receive any proceeds of the loan he stood to potentially benefit a s a member of the Limited Liability Company if the business venture (development of real property in Shelter Cove, Humboldt County, California) had been successful. The fact that Mr. Defilippis did not individually obtain any of the loan proceeds does not change his status from borrower to guarantor.

"(5) No written guaranty agreement was presented at trial, and presumably none exists.

"(6) The Court's finding that defendant Defilippis is a borrower renders moot his contention that the 2007 amendment of the promissory note (by and between plaintiff and Livin' The Cove, LLC) rendered Mr. Defilippis an exonerated personal guarantor.

"(7) Defendant Defilippis is an attorney licensed in the State of California. While he does not claim expertise in real estate matters he must have been aware, at least generally, of the legal distinction between 'borrower' and 'guarantor' at the time of entering into this transaction. While the court considered the parole evidence offered by the defense in seeking to establish guarantor status, such evidence was not persuasive.

"For the above-stated reasons, judgment in judicial foreclosure shall enter in favor of plaintiff John Randle, Trustee, and against defendants Steve M. Defilippis and Livin' The Cove, LLC, jointly and severally, for the debt due in the amount of $220,978.34 plus interest at $65.00 per day from October 1, 2008 to the date of entry of judgment herein, along with attorney fees and costs. The court reserves jurisdiction as to plaintiff's remaining cause of action for fraud in the inducement."

Defilippis filed a request for statement of decision, requesting a decision "explaining the factual and legal bases for [the court's] decision regarding the following controverted issues." Twenty-five issues were listed. However inappropriate Defilippis's request,[2] a proposed statement of decision was prepared addressing all 25 0issues. To this, Defilippis filed his objections, objecting to 23 of the 25 issues.[3]

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[2] A request for statement of decision "shall specify" the particular controverted issues the requesting party wishes the court to address. (Code Civ. Proc., § 632.) Thus, the request is to ask for the legal or factual basis for the court's decision. It is not to interrogate the judge on evidentiary matters. (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 525 [request for statement of decision held improper where it asked the court to answer over 75 questions and make a list of findings on evidentiary facts regarding issues not controverted by the pleadings].)

[3] The only issues not objected to were 1 and 20. These "issues" were (1) whether Sun Pacific acted as Randle's agent, and (20) whether the court "is considering" the parol evidence regarding Defilippis's status as a guarantor.

On December 30, the trial court entered its lengthy statement of decision, and that same day its judgment, as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

"1. Judgment in judicial foreclosure shall enter in favor of plaintiff John Randle, Trustee of the John Randle Trust created October 28, 2004, and against defendants Steve M. Defilippis and Livin' the Cove, LLC, jointly and severally, for the debt due in the amount of $220,978.34 plus interest at $65.00 per day from October 1, 2008, to the date of entry of judgment herein, along with attorney fees and costs.

"2. The court reserves jurisdiction as to plaintiff's remaining cause of action for fraud in the inducement."

On January 14, 2011, Defilippis filed a motion for new trial, asserting error in law and insufficient evidence to justify the judgment. Following Randle's opposition and Defilippis's reply, the motion was denied on April 22, 2011.

Meanwhile, on February 17, 2011, Randle filed a motion for attorney fees. Defilippis filed opposition, and Randle a reply. The trial court ultimately awarded Randle attorney fees in the amount of $101,380.

On March 24, 2011 Defilippis filed his notice of appeal.

DISCUSSION

Defilippis Has Demonstrated No Right to a Jury Trial

On the first day of trial the court heard various motions in limine, one of which was Defilippis's "motion . . . for order confirming jury trial regarding promissory note." The trial court denied it. Defilippis's first argument is that denial of a jury trial was reversible error. We disagree. Defilippis has not shown he was entitled to a jury trial. Not procedurally. Not substantively.

The procedure required of a party to obtain a jury trial is well settled. The description in Witkin is illustrative:

"**B. Procedure To Obtain Jury Trial.**

1. [§98] Demand.

(1) *Necessity.* The right to a jury trial is 'inviolate,' and, in civil cases, it may be waived only according to the methods specified in [Code of Civil Procedure section 631, subdivision (d)]. [Code Civ. Proc., § 631, subd. (a).] One of the specified methods is failure 'to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.' [Code Civ. Proc., § 631, subd. (d)(4).]" (7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 98, p. 125.)

Defilippis has not shown that he met the required procedure.

According to the register of actions, Defilippis filed his first case management statement on December 15, 2008, for a case management conference on January 5. There is no indication that in that statement, or at that conference, Defilippis requested a jury trial. The same is true for the numerous case management conferences that followed, those on May 6, 2009, September 23, 2009, and December 1, 2009, and also for the readiness conference held on July 28, 2010.

The register of actions also shows that a trial date had been set at least as early as May 27, 2009. Again, there is no indication that Defilippis requested a jury trial as required by Code of Civil Procedure section 631, subdivision (d)(4) [a demand for jury must be made at the time the cause is first set for trial].

In addition to making a proper demand, Defilippis had to deposit advance jury fees, which deposit had to be made at least 25 calendar days before the date initially set for trial. (Code. Civ. Proc., § 631, subd. (b).) Defilippis has shown no such deposit.

The most fundamental rule of appellate review is that the order appealed from is presumed to be correct. Thus, all " 'intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

Because of this, Defilippis has the burden of overcoming the presumption of correctness, and must provide an adequate record demonstrating the alleged error. Failing this, the issue must be resolved against him. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 [" 'if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed' "].)

In short, Defilippis has not shown that he did what was required of him to obtain a jury trial. But even if he had, he would not succeed, because he had no right to a jury trial here.

As noted above, both sides filed motions in limine to bifurcate, with Randle's motion seeking to "have the court hear the equitable claim of judicial foreclosure and later schedule a jury trial to hear the legal claim of fraud." The trial court agreed to bifurcate, ruling that "we shall proceed with the equitable claim of judicial foreclosure as a court trial, and if necessary or appropriate later schedule a jury trial to hear the second cause of action." And so proceeded the action for judicial foreclosure,[4] an action which does not entitle one to a jury trial, as long settled law has held.

The 1919 case of *J.I. Case T.M. Co. v. Copren Bros.* (1919) 45 Cal.App. 159 (*J.I. Case*) is illustrative. The action there was on three promissory notes and "to have foreclosed a . . . . mortgage." (*J.I. Case, supra,* 45 Cal.App. at p. 161.) Plaintiff prevailed and defendants appealed, making numerous arguments, the fourth of which is pertinent here. The Court of Appeal decided it as follows:

"The court made no error in denying the application of the defendants for a trial by jury. A proceeding or action instituted for the purpose of foreclosing a mortgage, either on real or personal property, involves an equitable remedy, and it is about as elementary a

[4] An action, not incidentally, which can include a determination whether Defilippis can be liable on the note. As Defilippis's closing brief below acknowledged, "Code of Civil Procedure section 726, governing claims for judicial foreclosure of deeds of trust, authorizes the court to '. . . determine the personal liability of any defendant for the payment of the debt secured by the mortgage or deed of trust. . . .' (*Id*. at subd. (b).)"

proposition as is to be found in the whole body of the law that juries are allowable in the equity courts, if at all, only as a matter of grace and not of right. Where a jury is invoked and is allowed in an equity case, it is merely because the chancellor desires its assistance in the solution of the questions of fact at issue, but the function or office of the jury in such a case is in nature and scope advisory only, and the jury's conclusion or verdict upon the facts may be disregarded, even arbitrarily, by the chancellor, and findings of fact may be made by him contradictory to those implied from the verdict, and if there be testimony supporting the findings by the judge, the decree will stand immune from disturbance, so far as the findings are concerned." (*J.I. Case, supra*, 45 Cal.App. at pp. 167-168.)

Ten years later the California Supreme Court confirmed this principle, in *Proctor v. Arakelian* (1929) 208 Cal. 82. There, in an action to set aside a note and trust deed, the Supreme Court cited numerous cases and held: "We are of the view that the appellant was not entitled to a jury trial as a matter of right. The complaint presents a plain case for the foreclosure of a vendor's lien. [Citation.] The enforcement of such liens is a well-recognized function of courts of equity. [Citations.] It follows that a jury may not be demanded of right in actions to foreclose liens. [Citations.] No distinction in the matter of a jury trial is to be made between a vendor's lien for the unpaid purchase price and other liens. Not only is the action for the foreclosure of a vendor's lien an equitable proceeding, but the right to the lien is a creature of equity, now recognized by statute. [Citations.] Although an action for relief which can be afforded only by a court of equity may involve questions of fraud and deceit such as are cognizable in a court of law, plaintiff is not entitled to a jury trial on such issues when they arise in an equitable proceeding." (*Id.* at p. 98.)

All of this is collected in Witkin: "*Actions To Foreclose Mortgages or Liens.* Equity has jurisdiction over the foreclosure of mortgages and other liens. (See *Hibernia Savings & Loan Soc. v. London & Lancashire Fire Ins. Co.* (1903) [138 Cal. 257, 259] [equitable foreclosure of judgment lien]; *Proctor v. Arakelian* (1929) [208 Cal. 82, 98]; *Brichietto v. Raney* (1926) [76 Cal.App. 232, 240] [jury verdict was only advisory];

Holbrook v. Phelan (1931) [121 Cal.App. Supp. 781, 783] [complaint to foreclose lien on real property is action in equity]; *Elmore Jameson Co. v. Smith* (1939) [34 Cal.App.2d 609, 616] [foreclosure of crop mortgage; equity jurisdiction to impose charge on proceeds to reimburse junior lienholder for expenditures and services] . . . ." (3 Witkin, Cal. Procedure, *supra,* Actions, § 128, p. 207.)

In sum, an action for judicial foreclosure, as with all lien foreclosures, is an equitable claim to be tried by the court. The court may empanel an advisory jury if the court is so inclined. (*J.I. Case*, *supra*, 45 Cal.App. at p. 168.) The trial court here considered that, decided it did not need an advisory jury, and proceeded to hear the equitable foreclosure cause of action—which, as noted, included Defilippis's defense that he was a guarantor. There was no error.

Substantial Evidence Supported The Trial Court's Determination That Defilippis Was Liable on the Note

Defilippis's second argument is that the trial court committed reversible error by "finding liability," an argument that has two components. The first, rather brief, is that Defilippis had been removed as a party by the amendment to the note. The second, rather lengthy, is that the "promissory note and undisputed evidence establish Mr. Defilippis's role as a personal guarantor." Neither component has merit.

The first component of the argument is premised essentially on the fact that Defilippis did not sign the amendment to the note. As Defilippis puts it, "[t]he terms of Amendment No. 1, as a straightforward matter, establish that the parties to the" note are Randle and the LLC. We are unpersuaded.

It is probably enough to note the single sentence in the Agreement portion of the amendment: "2. In all other respects, the terms of the promissory note attached hereto as Exhibit A shall remain unmodified and in full force and effect."

Beyond that, the evidence shows that, despite his knowledge that the amendment was being negotiated, Defilippis at no point directed—indeed, even attempted—to have his name removed from the note, and rather sat silently by, ultimately to benefit from the

amendment. The trial court commented on this in over two pages in the statement of decision—pages utterly ignored by Defilippis:

"14. With respect to the issue of whether the deletion of . . . Defilippis' name from the amendment's recitation of the parties to the amendment to the promissory note terminated . . . Defilippis' role as a party to the promissory note, the court's decision is no . . . .

"This decision is based on the following facts: Defendant Defilippis authorized the co-borrowing LLC to enter into the amendment several ways. First, . . . Defilippis signed the LLC resolution which states: 'The LLC is going to obtain financing through Sun Pacific Mortgage and Real Estate in the form of a loan to enable the LLC to pay certain obligations and to proceed with the operations consistent with the LLC's goal of constructing two homes for the purpose of resale for profit . . . .' [Citation.] The amendment was made by the LLC in order to proceed with their goal of constructing two homes for profit. . . . Defilippis' signature on the LLC resolution authorized the amendment since the amendment was consistent with the LLC's goal of proceeding to construct two homes for profit.

"Secondly, . . . Defilippis voluntarily accepted the benefits of the favorable amendment. When the amendment was negotiated, the loan had matured, but . . . Defilippis did not satisfy the note as he was obligated to do as a borrower. Instead, he enjoyed the benefit of the amendment which is the equivalent to consent.

"Thirdly, . . . Defilippis' silence regarding the modification is enough to be considered consent. . . . Defilippis did not delete his name from the loan amendment; he was simply not involved with the loan modification, though he did authorize the LLC to execute amendments.

"Finally, defendant Defilippis provided the LLC with the authority to enter into the amendment by signing the promissory note secured by a deed of trust as a borrower. The promissory note's title is 'NOTE SECURED BY DEED OF TRUST' and in paragraph 8 of the note it states that the note is secured by a deed of trust. (See plaintiff's Exhibit 6). As a result, defendant Defilippis agreed to the terms in the deed of trust

which state: 'this deed of trust shall provide the same security on behalf of the Lender, to cover extensions, modifications or renewals of the Note at a different rate of interest; and the performance of the covenants and agreements of Borrower herein contained.' [Citation.] The amendment extended the time for repayment while reducing the principal and interest rate. [Citation.] These modifications were authorized in the deed of trust which together with the promissory note constitutes a loan contract. Therefore, defendant Defilippis agreed in the loan contract to permit the LLC to enter into such amendments."

As noted above, the trial court decided what Defilippis calls the "lynch pin" issue, and determined that Defilippis was a "borrower." The second component of Defilippis' argument attacks this determination, which component is lengthy, consisting of 18 pages in his brief. The argument asserts that "The Trial Court Committed Reversible Error by Finding Liability Where the Promissory Note and Undisputed Evidence Establish Mr. Defilippis' Role as a Personal Guarantor." There follow 10 separate argument headings, including these: "Defilippis Was a Personal Guarantor, Not a Borrower"; "Defilippis Was Treated as a Guarantor, Not a Borrower"; "Plaintiff John Randle Knew, Through His Agent, That Steve Defilippis was a Guarantor of Livin' the Cove, LLC"; "Defilippis Played No Role in the Negotiation of the Amendment to the Promissory Note, Which Was Drafted By Plaintiff, Through His Agent, William Hatcher, Esq."; and "The Amendment . . . Materially Altered the Promissory Note, and Thereby Exonerated Steve Defilippis as a Guarantor." Within such headings, the 18 pages set forth the "evidence" Defilippis claims support him, much of which reiterates—sometimes in identical language—the many pages of "case facts" in the beginning of the brief. Defilippis's recitation of the evidence ignores all the contrary evidence, including the evidence relied on by the trial court—all the evidence that Defilippis was a borrower. We are nonplussed.

We recently had occasion to comment on a similar appellant's brief, in *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531, as follows:

"California Rules of Court, rule 8.204(a)(2)(C) provides that an appellant's opening brief shall '[p]rovide a summary of the significant facts . . . .' And the leading

California appellate practice guide instructs about this: 'Before addressing the legal issues, your brief should accurately and fairly state the critical facts (including the evidence), free of bias; and likewise as to the applicable law. [¶] Misstatements, misrepresentations and/or material omissions of the relevant facts or law can instantly "undo" an otherwise effective brief, waiving issues and arguments; it will certainly cast doubt on your credibility, may draw sanctions [citation], and may well cause you to lose the case!' (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group [2011]) ¶ 9:27, p. 9-8, italics omitted.) Jill's brief does ignore such instruction.

"Jill's brief also ignores the precept that all evidence must be viewed most favorably to Ken and in support of the order. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925–926; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) This precept is equally applicable here, where Judge Wong issued a statement of decision: "Where statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

"What Jill attempts here is merely to reargue the 'facts' as she would have them, an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that she is not to 'merely reassert [her] position at. . . trial.' (*Conderback, Inc. v. Standard Oil Co.* (1966) 239 Cal.App.2d 664, 687; accord, *Albaugh v. Mt. Shasta Power Corp.* (1937) 9 Cal.2d 751, 773.) In sum, Jill's brief manifests a treatment of the record that disregards the most fundamental rules of appellate review. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 365, 368, pp. 421–424, 425-426.) As Justice Mosk well put it, such 'factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to it at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail.' (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398–399.)" What we said about Jill's brief in *Davenport* applies to Defilippis's brief here.

There was substantial evidence that Defilippis was a borrower.

As indicated above, the LLC's operating agreement provided that "the loan will be obtained" by Defilippis. Defilippis signed the loan application as the "borrower." And he signed the note—not to mention seven other documents—as "borrower." As the trial court noted, the note provides as follows:

> "7. **RESPONSIBILITIES OF PERSONS UNDER THIS NOTE**
>
> If more than one person signs this note, each of us is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorses of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of the guarantor, surety, or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note."

Last, but by no means incidentally, no written guaranty agreement was presented at trial.

Lest there be any doubt on this subject, we note Defilippis's telling admission below, in his closing papers on his motion for new trial: "The great weight of the evidence in this case confirmed that Mr. Defilippis was intended to be, and was, a personal guarantor of the LLC's debt." While we disagree with Defilippis as to the claimed "weight" of the evidence, the fact that he acknowledges evidence contrary to his position makes the point—there was substantial evidence.

Awarding Attorney Fees Was Not Error

Randle's verified amended complaint prayed for attorney fees; so did Defilippis's verified answer. As noted above, following the judgment in his favor, on February 17, 2011, Randle filed a motion for attorney fees, seeking $102,490 in fees. The motion was supported by a declaration from his counsel, with exhibits, testifying as to the hours spent on the litigation and the billing rates. The motion was scheduled for hearing on February 25.

Defilippis opposed the motion, both as to Randle's entitlement to fees at all and also as to the amount claimed. Randle filed a reply. And according to the register of

actions and the order, the motion came on for hearing on February 25, though there is no transcript of any hearing in the record. On April 22, 2001 the trial court entered its order awarding Randle attorney fees of $101,380, stating that "[t]he attorney fees are reasonable considering the number of motions litigated."

Defilippis's last argument is that the trial court committed reversible error in awarding attorney fees. The argument is brief indeed, and does not contest the amount of award, but rather the award in its entirety, on the basis that Randle did not "prove the contractual prerequisite to a judgment for fees."

We begin by noting that we agree with Defilippis that the standard of review is de novo. (*Globalist Internet Technologies, Inc. v. Reda* (2008) 167 Cal.App.4th 1267, 1273 ["whether the trial court had the authority to award attorney fees is a legal issue which we review de novo"].) While we agree with that, we disagree with Defilippis's argument.

Defilippis's argument relies on one paragraph of the note, paragraph (c), to argue that the so-called "prerequisite" was not shown. Such reliance, we conclude, is misplaced, in light of all applicable provisions of the note.

Those provisions began on the first page of the note, in a section entitled "BORROWER'S FAILURE TO PAY AS REQUIRED," which provide in pertinent part as follows:

"(A) **Late Charge For Overdue Payments.** If I do not pay the full amount of each monthly payment by the end of 10 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 10.00% of my overdue payment or U.S. $0.00, whichever is more. I will pay this late charge only once on any late payment.

"In the event a balloon payment is delinquent more than 10 days after the date it is due, I agree to pay a late charge in an amount equal to the maximum late charge that could have been assessed with respect to the largest single monthly installment previously due, other than the balloon payment, multiplied by the sum of one plus the number of months occurring since the late payment charge began to accrue.

"(B) **Default.** If I do not pay the full amount of each monthly payment due under this Note by the date stated in paragraph 3 above, I will be in default, and the Note Holder may demand that I pay immediately all amounts that I owe under this Note.

"Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

"(C) **Payment of Note Holder's Costs and Expenses.** If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back for all its costs and expenses to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney's fees. A default upon any interest of any Note Holder shall be a default of all interests."

The second page of the note provides as follows:

"BORROWER'S WAIVERS

"I waive my rights to require the Note Holder to do certain things. Those things are: (a) to demand payment of amounts due (known as 'presentment'); (b) to give notice that amounts due have not been paid (known as 'notice of dishonor'); (c) to obtain an official notification of nonpayment (known as 'protest'). Anyone else who agrees to keep the promises made in this Note, or who agrees to make payments to the Note Holder if I fail to keep my promises under this Note, or who signs this Note to transfer it to someone else, also waives these rights. These persons are known as 'guarantors, sureties and endorsers.' "

In sum, under the waiver Defilippis agreed that no demand had to be made.

But assuming one had to, it is arguable that one was made here. The "as described above" in paragraph (B) includes a request to pay immediately when the note is in default, and also have the "right to do so if [the note] is in default at a later time." Here, of course, Randle filed the lawsuit which could be considered sufficient. (See *Title G. & T. Co. v. Fraternal Finance Co.* (1934) 220 Cal. 362, 364 ["While there is no allegation in the complaint that plaintiff exercised its option to declare the principal sum of said promissory note due and payable, such allegation was not necessary. It has been

repeatedly held that the commencement of the action itself is sufficient to show the exercise of such option."].)

Superimposed on all this is the observation by our Supreme Court that equitable considerations play a role in the interpretation and application of attorney fee provisions. (See *International Industries, Inc. v. Olen* (1978) 21 Cal.3d 218, 223-224.) There, a defendant who prevailed when a pretrial dismissal had been entered sought attorney fees. The Supreme Court affirmed that no fees should be awarded out of a concern for the "efficient and equitable administration of justice." (*Id.* at p. 225.) Doing so, the court noted as follows:

"In *Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.* (1969) 1 Cal.3d 266, 272, this court rejected literal and inflexible interpretation of attorney fee clauses, pointing out that literal construction of the clause before the court would permit—contrary to sound public policy—the promisee to recover even if he was responsible for the litigation, encouraging and in fact indemnifying vexatious and frivolous litigation. Although the contract provision in that case provided for defendant's recovery of fees for any litigation, this court held that fees could be recovered only to the extent necessary to protect the defendant's rights and that where the plaintiff is partially successful, the plaintiff's liability is limited to fees for the part of the defense which was successful. Other cases have likewise recognized that the contractual provisions for attorney fees will not be inflexibly enforced and that the form of the judgment is not necessarily controlling, but must give way to equitable considerations. [Citations.] Nevertheless, some older decisions have taken a mechanical approach to attorney fees clauses." (*International Industries, Inc. v. Olen, supra*, 21 Cal.3d 218 at pp. 223-224.)

We read *Olen* as standing for the proposition that equitable considerations are important here, a view shared by the author of a leading work on California attorney fees: "If the construction and application of a contractual fee clause are uncertain or could lead to oppressive results if literally applied, the court may be guided by equitable principles and the form of judgment is not necessarily controlling." (Pearl, Cal. Attorney Fee Awards (3d ed. 2012) § 4.21, p. 259.)

Those equitable considerations clearly favor Randle here, who had to incur over $100,000 in legal fees in pursuit of a relatively straight forward cause of action based on a deed of trust and promissory note. And Defilippis did not make it easy, not with the "number of motions" the trial court referred to here, which included not one, but two, motions for judgment on the pleadings, and a motion for summary judgment. Indeed, Defilippis went so far as to file opposition to what was essentially a pro forma motion to amend the complaint.[5]

Defilippis notes that "There is good reason for the demand requirement in the promissory note. The demand requirement gives the recipient the opportunity to attempt to resolve the default without the expense of litigation." True enough perhaps, but if Defilippis's litigation tactics are any indication, there can be no question that such a demand would not have been efficacious. The law neither does nor requires idle acts. (Civ. Code, § 3532.)

DISPOSITION

The judgments are affirmed. Randle shall recover his costs on appeal.

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[5] The leading practical treatise comments on this:

"**Policy favoring amendment**: First of all, judicial policy favors resolution of all disputed matters between the parties in the same lawsuit.

"Thus, the court's discretion will usually be exercised *liberally* to *permit* amendment of the pleadings. [See *Nestle v. Santa Monica* (1972) 6 [Cal.]3d 920, 939; [citations].)

"1) . . . **Denial rarely justified:** The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified: 'If the motion to amend is *timely* made and the granting of the motion will *not prejudice* the opposing party, it is *error to refuse* permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion.' [*Morgan v.* [*Superior Court*] (1959) 172 [Cal.App.]2d 527, 530 (italics added)." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶6:638-6:639, pp. 6-163–6-164.)

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.